In the Supreme Court of the United States

No. 249

THE EVANGELICAL LUTHERAN SYNOD OF KANSAS AND ADJACENT STATES, a Corporation,
Petitioner,

VERSUS

FIRST ENGLISH LUTHERAN CHURCH of Oklahoma City, a Corporation; FRED H. BLOCH, as Pastor Pretendant of such Church; and E. C. DOERR, J. H. WINNEBERGER, ALBERT SWANSON, STANLEY HOMER, WALTER QUICK, A. E. ROSENTHAL, V. H. SMITH, and S. C. HOSHUR, as Members of the Board of Deacons and Trustees,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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August, 1943.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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PETITION

Your Petitioner, The Evangelical Lutheran Synod of Kansas and Adjacent States, a corporation, hereinafter referred to as "Kansas Synod", prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in this cause on May 19, 1943, reversing a judgment of the United States District Court for the Western District of Oklahoma and remanding said cause to the district court with direction to dismiss the action.

OPINIONS BELOW

The opinion of the District Court (R. 69-92) is reported in 47 Fed. Supp. 954. The opinion of the Circuit Court of Appeals (R. 107-110) is reported in 135 Fed. (2d) 701.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered May 19, 1943 (R. 107-110). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The Petitioner, Kansas Synod, is a District Synod within the United Lutheran Church in America, a national church organization adhering to the Lutheran Faith, and has jurisdiction over a number of Lutheran Church congregations within the States of Kansas, Oklahoma and Missouri. The First English Lutheran Church of Oklahoma City, hereinafter referred to as "City Church", is an incorporated religious society in Oklahoma City organized under the jurisdiction of the Kansas Synod; and up until the controversy hereinafter referred to, was a member of the Kansas Synod.

The United Lutheran Church in America, the National Body, the Kansas Synod, the District Body, and the City Church, the Local Congregation, all have written

constitutions which set out and define their respective rights and powers in relation to each other (R. 80-84).

In 1942 the congregation of the City Church became divided and at a congregational meeting a plurality of the members of the congregation present and voting adopted a resolution attempting to withdraw the City Church from membership and from the jurisdiction of the Kansas Synod, and attempted to affiliate the City Church with the Midwest Synod, another District Synod within the United Lutheran Church in America (R. 43). The Kansas Synod was advised of this action by the City Church, and by resolution it refused to give its consent to such withdrawal (R. 11-12); and by resolution the Kansas Synod suspended the pastor of the City Church and recognized the faction of the congregation of the City Church which opposed the withdrawal of the City Church from the Kansas Synod, as the lawful congregation of the City Church (R. 13-18). This resolution was served upon the pastor and officers of the City Church who disregarded the resolutions of the Kansas Synod; and this action was commenced by the Kansas Synod in the United States District Court for the Western District of Oklahoma against the City Church, the pastor, and members of the Board of Deacons and Trustees thereof to enjoin them from exercising any control over the City Church building and parsonage, from affiliating the City Church with the Midwest Synod, from paying over any money to the Midwest Synod, and from interfering with those members of the congregation of the City Church who remained loyal to

the Kansas Synod in their use of the church property (R. 3-22).

The Respondents by their answer alleged in effect that the City Church had the right to withdraw from the Kansas Synod without its consent (R. 41-46).

It was alleged in the complaint by the Kansas Synod and admitted by stipulation at the trial that the church building and parsonage of the City Church, title to which is held in the name of the City Church, is of the reasonable value of $65,000.00; and it was alleged in the complaint and admitted at the trial that in the fiscal year 1940 the City Church paid to the Kansas Synod for benevolences a sum in excess of $1400.00; and that in a period of five years—if the members of the Council of the City Church are not restrained and enjoined from paying over money to the Midwest Synod—that a sum in excess of $7,000.00 will be diverted from the Kansas Synod within said period. It was alleged in the complaint, but not admitted, that the Kansas Synod has a direct, inherent and organic interest in the City Church.

The case was tried upon stipulation (R. 47-52) and testimony, taken by deposition, of two witnesses (R. 52-69); the trial court wrote an opinion (R. 69-92) and rendered judgment in favor of the Kansas Synod, granting an injunction substantially as prayed for (R. 98-99). But by subsequent order the trial court provided that, pending an appeal to the Circuit Court of Appeals, the opposing factions should each have exclusive use of the City Church building during alternate weeks for the purpose of conducting religious services (R. 100-102).

The Respondents appealed to the Circuit Court of Appeals for the Tenth Circuit, and their grounds for appeal were substantially that it was not necessary for the congregation of the City Church to obtain the consent of the Kansas Synod in order to withdraw therefrom, and that the Commission of Adjudication of the United Lutheran Church in America by its decision held that said congregation of the City Church had the right to withdraw from the Kansas Synod (R. 1-2).

The cause was submitted to the Circuit Court of Appeals without oral argument (R. 107), and the Circuit Court of Appeals wrote an opinion (R. 107-110) holding that title to the property of the City Church has never been vested in the Kansas Synod, and that it has no beneficial interest therein which would be violated by the transfer of the synodical affiliation by the City Church; and that the City Church, although it has heretofore made payments to the Kansas Synod for benevolences, is under no legal or actionable obligation to continue to make such payments, and that therefore the Kansas Synod has no right to maintain the action. The Circuit Court of Appeals reversed the judgment of the trial court and remanded the cause with direction to dismiss the same.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in assuming, contrary to the evidence, that the City Church is an independent congregation and not bound by the orders and judgments of the Kansas Synod.

2. The Circuit Court of Appeals erred in holding that because title to the City Church property is held in the name of the City Church, a corporation, that the Kansas Synod has no beneficial interest therein.

3. The Circuit Court of Appeals erred in holding that the City Church is under no legal or actionable obligation to make payments for benevolences to the Kansas Synod.

4. The Circuit Court of Appeals erred in holding that the Kansas Synod cannot maintain this action.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals in holding that the City Church is an independent congregation and not bound by the orders and decrees of the Kansas Synod ignored the constitutional provisions of the United Lutheran Church in America, the Kansas Synod, and the City Church, which definitely set forth and provide that the City Church is under the jurisdiction of the Kansas Synod and must obey its orders and judgments, and completely ignored the decision of the District Court of Appeals of California in *First English Lutheran Church of Los Angeles et al.* v. *Disinger et al.*, 6 Pac. (2d) 522, and

second appeal, 30 Pac. (2d) 545; and the decision of the Supreme Court of Pennsylvania in *Nagle et al.* v. *Miller et al.*, 118 Atl. 670, which decisions definitely hold that a congregation within the United Lutheran Church in America is subordinate to the superior judicatories within the United Lutheran Church in America and is subject to and bound by their orders and decrees.

2. The opinion of the Circuit Court of Appeals in holding that the Kansas Synod has no beneficial interest in the church property and parsonage of the City Church is in conflict with the principles laid down by this Court in *Watson* v. *Jones*, 13 Wall. 679, 20 L. ed. 666; and is in direct conflict with the opinion in *Barkley et al.* v. *Hayes et al.*, decided by the United States District Court for the Western District of Missouri, in 1913, 208 Fed. 319, which was affirmed by the Circuit Court of Appeals for the Eighth Circuit in *Duvall et al.* v. *Synod of Kansas, etc.*, 222 Fed. 669, and affirmed by the Supreme Court of the United States in *Shepard et al.* v. *Barkley et al.*, 247 U. S. 1; and is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Purcell et al.* v. *Summers et al.*, decided in March, 1942, 126 Fed. (2d) 390, in which *certiorari* was denied by the Supreme Court of the United States on October 12, 1942, 317 U. S. 640; and is in conflict on principle with the decision of the Supreme Court of the United States in *Helm* v. *Zarecor*, 222 U. S. 32; and is in direct conflict with the decision of the Supreme Court of South Dakota in *Presbytery of Huron et al.* v. *Gordon et al.*, decided in 1941, 300 N. W. 33; and is in conflict with the decision of the Appellate

Division of the Supreme Court of New York in *Trustees of the Presbytery of New York* v. *Westminster Presbyterian Church of West Twenty-third Street et al.*, 127 N. Y. Supp. 851.

3. The opinion of the Circuit Court of Appeals in holding that the City Church is under no legal or actionable obligation to make payments to the Kansas Synod ignores the constitution of the Kansas Synod, and conflicts with the principle set forth in the decision of the Supreme Court of the United States in *Watson* v. *Jones, supra.*

4. If the decision below is allowed to stand it will be an adjudication that any of the 3980 congregations of the United Lutheran Church in America located within the continental United States and Canada, having a membership of more than a million and a half Lutherans, may disregard the organic law of the church and the judgments of the superior judicatories within said church organization, and may withdraw its affiliation with said church at any time by plurality vote of its membership without the consent of any superior body within the church organization.

The questions here raised are of the greatest importance to the entire membership within the United Lutheran Church in America, as well as the membership of the Kansas Synod, and if the decision below is allowed to stand it will result in untold confusion which may easily lead to the complete disruption of the organization within the United Lutheran Church in America which has been in existence for more than twenty years.

CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of *certiorari* should be granted.

W. R. BLEAKMORE,
JAMES E. GRIGSBY,
Attorneys for Petitioner.

August, 1943.

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FIRST ENGLISH LUTHERAN CHURCH of Oklahoma City, a Corporation; FRED H. BLOCH, as Pastor Pretendant of such Church; and E. C. DOERR, J. H. WINNEBERGER, ALBERT SWANSON, STANLEY HOMER, WALTER QUICK, A. E. ROSENTHAL, V. H. SMITH, and S. C. HOSHUR, as Members of the Board of Deacons and Trustees,
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OPINIONS OF COURTS BELOW

The opinion of the District Court of the United States for the Western District of Oklahoma is reported in 47 Fed. Supp. 954. The opinion of the Circuit Court of Appeals for the Tenth Circuit is reported in 135 Fed. (2d) 701.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 19, 1943. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

This is a suit brought by the Petitioner, The Evangelical Lutheran Synod of Kansas and Adjacent States, a corporation, hereinafter referred to as "Kansas Synod", against the Respondents, the First English Lutheran Church of Oklahoma City, a corporation, hereinafter referred to as "City Church", its pastor, and certain individuals as members of the Board of Deacons and Trustees, to obtain a permanent injunction preventing the Respondents from exercising any control over the City Church property, which consists of the church building and parsonage, and from affiliating the City Church with the Midwest Synod; from paying over any money to the Midwest Synod, and from interfering with those members of the congregation of the City Church who remain loyal to the Kansas Synod in their use of the City Church property (R. 3-22).

The Kansas Synod is a District Synod within the United Lutheran Church in America, a national organization adhering to the Lutheran Faith, and has jurisdiction

over a number of Lutheran congregations within the States of Kansas, Oklahoma and Missouri. The City Church is a congregation established under the jurisdiction of the Kansas Synod in 1902, and has since its inception until 1942 complied with the constitution and laws of the Kansas Synod. In 1942 the congregation of the City Church became divided and at a congregational meeting a plurality of the members present and voting adopted a resolution withdrawing the City Church from the Kansas Synod and affiliating it with the Midwest Synod, another District Synod within the United Lutheran Church in America (R. 43).

Notice of the passage of this resolution was given to the Kansas Synod, which passed a resolution refusing to recognize the action of the congregation of the City Church and refusing to give its consent to the withdrawal (R. 11-12); and by resolution the Kansas Synod suspended the pastor of the City Church and declared those members of the congregation who opposed the withdrawal to be the lawful congregation of the City Church, and instructed said congregation so recognized to call a minister to conduct worship (R. 12-18). These resolutions were served upon the individual Respondents who refused to relinquish possession of the church building and parsonage, and this suit was instituted.

By their answer the defendants urged two grounds as their defense: (1) That the City Church had the right to withdraw from the Kansas Synod without its consent, and (2) that the Commission of Adjudication of the United

Lutheran Church in America had held that the withdrawal of the City Church from the Kansas Synod was legal (R. 40-46).

The case was tried on stipulation of facts and the testimony of two witnesses, and the district court held that the Kansas Synod was entitled to an injunction as prayed for (R. 69-99). But by subsequent order the court provided that each faction of the congregation of the City Church have exclusive possession of the church building during alternate weeks, pending appeal (R. 100-102).

The respondents appealed to the Circuit Court of Appeals, and as grounds for reversal of the judgment urged that, (1) it was not necessary for the City Church to have the consent of the Kansas Synod for it to withdraw, and (2) that the Commission of Adjudication of the United Lutheran Church in America (the highest court within the church) had decided that the withdrawal was legal (R. 1-2).

The Circuit Court of Appeals on its own motion held that the Kansas Synod had no beneficial interest in the property of the City Church, and that the City Church was under no obligation to make payments to the Kansas Synod, and that the Kansas Synod had no right to maintain the action for injunction. It reversed the judgment of the district court and remanded the case with instruction to dismiss.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in assuming, contrary to the evidence, that the City Church is an independent congregation and not bound by the constitution, orders and judgments of the Kansas Synod.

2. The court erred in holding that because title to the City Church property is held in the name of the City Church, a corporation, that the Kansas Synod has no beneficial interest therein.

3. The court erred in holding that the City Church is under no legal or actionable obligation to make payments for benevolences to the Kansas Synod.

4. The court erred in holding that the Kansas Synod cannot maintain this action.

SUMMARY OF ARGUMENT

The Circuit Court of Appeals held (R. 107-110) that title to the City Church property was held in the name of the City Church, a corporation, and the Kansas Synod has no beneficial interest therein; that the City Church, although it has for many years made payments to the Kansas Synod for benevolences, is under no legal or actionable obligation to continue to make the same, and therefore the Kansas Synod has no right to maintain this action to prevent the diversion of the City Church property to another Synod within the United Lutheran Church in America.

The City Church is not independent, but is an integral

part of a much larger and more important religious organization called the "United Lutheran Church in America", which Church is governed by three judicatories which rise in regular succession from the Council of the City Church, which is the lowest judicatory within the United Lutheran Church in America; the Kansas Synod, which has jurisdiction over several churches within its territorial jurisdiction, and the General Synod of the United Lutheran Church in America, which has jurisdiction over all of the Synods within the organization. The City Church property is not limited by any trust, but was purchased by the City Church for the general use of the religious congregation. Although the title is vested in the City Church, a corporation, it does not belong to the City Church; but it belongs to the entire membership of the United Lutheran Church in America. The ultimate right of ownership and control over the City Church property is vested in the judicatories established by the organic law of the United Lutheran Church in America; and the Kansas Synod, under the organic law of said Church, being the superior judicatory having direct and supervisory jurisdiction over the City Church, has the right of ownership and control over the City Church property.

—*Watson* v. *Jones,* 13 Wall. 679, 20 L. ed. 666;

Shepard et al. v. *Barkley et al.,* 247 U. S. 1;

Helm v. *Zarecor,* 222 U. S. 32;

Purcell et al. v. *Summers et al.,* 126 Fed. (2d) 390.

Trustees of the Presbytery of New York v. *Westminster Church of West Twenty-third Street et al.*, 127 N. Y. Supp. 851;

Presbytery of Huron et al. v. *Gordon et al.*, 300 N. W. 33.

The Kansas Synod, having the right to the use and control of the City Church property, has the right to maintain an action to prevent its diversion from use to which it is dedicated under the organic law of the Church. It being admitted that the City Church property is of the value of $65,000.00 and diversity of citizenship exists between the Kansas Synod and the respondents, the Federal Court has jurisdiction.

Under the constitution of the Kansas Synod, the City Church, as a subordinate body within the Kansas Synod, is under a duty to make payments to the Kansas Synod for benevolent functions of the Kansas Synod, and the Synod has the right to compel such payments by an action at law. It being admitted that such payments over a five-year period would amount to in excess of $7,000.00, the Federal Court has jurisdiction.

In holding that the Kansas Synod had no right that would be violated by a diversion by the City Church of its property from the Kansas Synod, and that the City Church was under no legal or actionable obligation to make payments to the Kansas Synod for benevolences, the Circuit Court of Appeals wholly disregarded the constitutional provisions of the City Church, the Kansas Synod, and the United Lutheran Church in America, and, in ef-

fect, held that the City Church was independent of any control by the Kansas Synod.

ARGUMENT

The City Church is not an independent organization, but is a member of a much larger and more important religious organization, and is under its government and control.

At the trial of this case it was stipulated that the constitutional provisions set forth in plaintiff's brief might be considered in evidence (R. 50-51). These constitutional provisions are set forth in the opinion of the trial court (R. 80-84), and reference to these provisions conclusively show that the City Church is not an independent religious organization, but is an integral part of the federated, associated or presbyterial form of church organization known as the United Lutheran Church in America.

The Constitution of the United Lutheran Church in America provides (R. 80-81):

> "Article VI, Section 6. To foster and develop the work of Synods, to exercise a general supervision of the Church, and on appeal of Synods to give counsel and to adjudicate questions of doctrine, worship and discipline.
>
> * * * * * * * *
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> "Article VIII, Section 2. As to Internal Relations. The United Lutheran Church in America shall have power to deal with internal matters that affect all its constituent Synods or the activities of The United Lutheran Church as a whole, except that when the operation of such power takes place within the domain of any of the Synods their consent and cooperation must first be secured.

"Section 6. As to the Maintenance of Principle and Practice. The United Lutheran Church in America shall protect and enforce its Doctrinal Basis, secure pure preaching of the Word of God and the right administration of the sacraments in all its Synods and congregations. It shall also have the right, where it deems that loyalty to the Word of God requires it, to advise and admonish concerning association and affiliation with non-ecclesiastical and other organizations whose principles or practices appear to be inconsistent with full loyalty to the Christian Church, but the Synods alone shall have the power of discipline.

"Article XIV. Section 1. No Synod in connection with the United Lutheran Church in America shall alter its geographical boundaries without the permission of the general body.

"Section 2. Synods shall give advice to their ministers and congregations concerning doctrine, life and administration, and shall exercise such disciplinary measures as may be necessary.

"Section 3. The Presidents of Synods shall exercise an oversight of the pastors and congregations composing their respective Synods, and shall be charged with the duty of carrying out the rules and regulations adopted by the Synods. When requested by the Executive Board they shall appear before it to represent their Synods. They may also make suggestions to the Executive Board, or seek its advice, with respect to the conditions and work in their Synods."

The Constitution of the Kansas Synod provides (R. 81-83):

"Article One, Section 3, subsection 1. This Synod shall consist of ministers and congregations in unity with the Doctrinal Basis in Section 2 received into membership as hereinafter provided.

"Subsection 2. Any Evangelical Lutheran minister applying for admission into this Synod and accepting this constitution with its Doctrinal Basis and who holds a letter of honorable dismissal from the President of the Synod from which he comes may upon recommendation of the Examining Committee be received into membership.

"Subsection 3. Any congregation located within or contiguous to the natural bounds of the territory of this Synod may upon the approval of the Executive Committee of Synod be received into membership by a majority vote at any regular convention.

"Subsection 4. Every congregation shall be faithful to its obligations to this Synod in all matters of support, practice, and Church government.

"Section 4, subsection 7. To ordain fitted men for the Holy Office of the ministry of the Gospel; and to suspend and depose those who dishonor it by false teaching, by insubordination, or an unworthy or wicked life.

"Subsection 8. To maintain discipline unto the fostering of holiness and fidelity in the ministry and people.

"Article Six, Section 1. 1. All applications for ordination shall be made to the President and referred by him to the Examining Committee which shall report on the same to the Synod and upon the recommendation of a two-thirds vote of the Synod may become members of this Synod.

"2. Every minister received into the Synod and every candidate who is ordained shall subscribe to this Constitution prior to admission into membership.

"Section 2. 1. A congregation desiring admission into the Synod shall place into the hands of the President a formal application signed by the Secretary of the Church Council and by the pastor, and shall send a representative to the meeting of the Synod; it shall submit a copy of its Constitution, and of its Charter, if Incorporated. If these are in accord with the requirements of the Constitution of the Synod, the congregation may be received into membership by a majority vote of the Synod at any regular meeting. Contemplated changes of its Constitution affecting its articles of faith, adherence to the Synod, and the United Lutheran Church in America, and disposition of its property, shall be reported to the President for his approval.

"Article Eight. 1. It shall be the duty of the Church Councils of every pastorate belonging to the Synod to appoint annually from its communicant members in good standing a lay delegate who shall represent the pastorate at all meetings of Synod and of Conference and submit his report to the pastorate; and the congregation or pastorate shall arrange to pay his and their pastor's expenses incurred by their full attendance upon such meetings. It may also appoint an alternate to take the place of the regular delegate in his absence.

"2. Every congregation belonging to the Synod, as it has a share in all its acts and supervisions, shall comply with the Constitution, By-Laws, decisions and recommendations of the Synod and local Conference, and conform to its public worship and ministrations

to the order used by the United Lutheran Church in America and approved by the Synod. It shall observe and make systematic effort to meet at least the apportionment for all objects to the Treasurer of Synod, and afford to all its members a regular channel of contributions for the benevolent operations of the church, the minimum amount being indicated by a budget of apportionment by Synod to the congregation. It shall make earnest effort to pay such amounts into the Synodical Treasury in monthly installments. It shall make due and liberal provisions for the ministration of the Word and the Sacraments, endeavor to hold at least one service every Lord's Day and see that the pastor is properly supported; and make all necessary provision for the promotion of piety in its families and for the Christian training of the young.

"3. In cases of vacancy, difficulty or strife in a congregation the Church Council shall seek the advice and instruction of the President of Synod.

"4. In case of strife or division, should any part of a congregation or pastorate belonging to the Synod reject the faith set forth in Article One, Section II, or revolt against the Constitutional provisions or its obligations as a member of the Synod, that part of the congregation or pastorate, whether majority or minority, of its membership which continues in unity with the Synod and its faith shall be recognized as the lawful congregation or pastorate.

"5. No congregation shall make any enactments in conflict with this Constitution or with the accepted regulations of the United Lutheran Church in America.

"6. Should a pastor resign, the Church Council

shall receive the letter of resignation and at once report the fact to the President of Synod."

The Constitution of the First English Lutheran Church of Oklahoma City provides (R. 83-84):

"Article II. It's Doctrinal Basis, and Formula of Government and Discipline, shall be those of the General Synod of the Evangelical Lutheran Church in the United States of America, and it shall always be connected with a District Synod of the General Synod.

"Article III. Section 2. Every church-member is amenable to the Council, and must appear before them when cited, and submit to the discipline of the church regularly administered.

"Section 3. It is the duty of every church-member to lead a Christian life; that is, to perform all the duties required of him or her in Scripture. Thus it is the duty of adults to perform all the Christian Duties; to attend the public worship of God, and to partake of the Lord's Supper whenever an opportunity is afforded. It is the duty of parents to educate their children in the nurture and admonition of the Lord, to teach them the doctrine of the church, and to subject them to the ordinances of the same.

"Article IV. Section 3. Pastors are amenable for their conduct to the Synod to which they belong; and that Synod is the tribunal which has the entire jurisdiction over them; excepting in those cases where a regular appeal is obtained to the General Synod, agreeably to Article IV, Section 8, of the Constitution of the General Synod.

"Article VI. Section 1. The Church Council is the lowest judicatory of the Church, consisting of the

pastor, or pastors, and all the elders and deacons of a particular church.

"Section 12. In all cases of appeal from the decisions of the Church Council, the Council shall take no further measures grounded on their decision until the sentence has been reviewed by the Synod. But if the decision appealed from be a sentence of suspension or excommunication, it shall immediately take effect and continue in force until reversed by the Synod. And in every case of appeal, the Church Council shall send a detailed and correct account of the proceedings in the case, and of the charges and evidence on both sides.'

When these constitutional provisions of the respective organizations are considered, no other conclusion can be reached than that the United Lutheran Church in America is governed by three judicatories: The Council of individual congregations, the District Synod, and the General Synod; the District Synod having entire jurisdiction over the ministers and the entire jurisdiction over the congregations, and the General Synod having jurisdiction over the Synods.

Congregations within the United Lutheran Church in America have been before the courts on two occasions. In *Nagle et al.* v. *Miller et al.*, decided by the Supreme Court of Pennsylvania in 1922, 118 Atl. 67, and in *First English Evangelical Lutheran Church of Los Angeles et al.* v. *Dysinger et al.*, decided by the District Court of Appeal of California in 1931, 6 Pac. (2d) 522; second appeal, decided in 1934, 30 Pac. (2d) 545, and in both of these cases the court held that the local congregation was subject

to the jurisdiction, orders and judgments of the Synod.

Throughout this litigation the Respondents have relied upon the decision of the Commission of Adjudication of the United Lutheran Church in America (R. 35-40) for their authority to withdraw from the Kansas Synod without its consent, and at all times the Respondents have recognized the jurisdiction of the Commission of Adjudication, which is the highest court within the United Lutheran Church in America.

The Circuit Court of Appeals completely ignored the constitutional provisions set forth herein and assumed, without deciding, that the City Church was independent of control by any superior judicatory within the Church, and basing its opinion upon this assumption, held that the Kansas Synod had no beneficial interest in the property of the City Church and that the City Church was under no legal or actionable obligation to make payments to the Synod.

A similar situation was passed on by this Court in *Watson* v. *Jones,* 13 Wall. 679, 20 Law ed. 666, where the action was defended on the ground that the plaintiffs had no such interest in the subject of the litigation to enable them to maintain the action. This Court, in disposing of the contention, made the following statement (p. 671):

> "The allegation that the plaintiffs are not lawful members of the Walnut Street Church is based upon the assumption that their admission as members was by a pastor and elders who had no lawful authority to act as such. As the claim of those elders to be such is one of the matters which this bill is brought to

establish, and the denial of which makes an issue to be tried, it is obvious that the objection to the interest of the plaintiffs must stand or fall with the decision on the merits, and cannot be decided as a preliminary question. Their right to have this question decided, if there is no other objection to the jurisdiction, cannot be doubted."

It is submitted therefore that the Circuit Court erred in assuming that the City Church is an independent religious society, but that the question as to the status of the City Church within the United Lutheran Church in America is a question going to the merits of the controversy, and Petitioner is entitled to a decision on that question.

The Kansas Synod as a Superior Church Judicatory has a beneficial interest in the property of the City Church.

The decision of the Circuit Court in holding that because title to the property of the City Church is held in the name of the City Church, a corporation, the Kansas Synod has no beneficial interest therein, is in conflict with the principles laid down by this Court in *Watson* v. *Jones, supra.* In that case the action was instituted in the United States District Court by certain members of the Walnut Street Presbyterian Church of Louisville, Kentucky, who were citizens of Indiana, against the Trustees and others of said Church, who were citizens of Kentucky, alleging that the plaintiffs were members in good standing of the Church and that it had been ever since its organization a part of the Presbyterian Church of the United States, which was governed by a written constitution, and that

the governing bodies of the General Church were, in successive order, the Presbytery of Louisville, the Synod of Kentucky, and the General Assembly of the Presbyterian Church of the United States, and that the defendants, together with others, had seceded from the General Church and had voluntarily connected themselves with another religious society and had repudiated and renounced the authority and jurisdiction of the various judicatories of the Presbyterian Church of the United States, and plaintiffs prayed for an injunction and to obtain possession of the Walnut Street Church property. The Court, after reviewing the facts, used this language:

> "But the third of these classes of cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved, and to other considerations, is every way the most important.
>
> "It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government.
>
> "The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long

as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the Presbytery over the session or local church, the Synod over the Presbytery, and the General Assembly over all. These are called in the language of the church organs, 'judicatories,' and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases.

"In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

It follows from the principles laid down by this Court in the above case the City Church is not free to use its property according to its whim or fancy, but is controlled in the use of the property by the superior judicatories within the Church.

In the case of *Barkley et al.* v. *Hayes et al.*, and *Synod of Kansas of the Presbyterian Church in the United States of America et al.* v. *Missouri Valley College et al.*, decided by the United States District Court for the Western District of Missouri, Western Division, in 1913, 208 Fed. 319, which was affirmed by the Circuit Court of Appeals for the Eighth Circuit in *Duvall et al* v. *Synod of Kansas, etc.*, 222 Fed. 669, and affirmed by this Court in *Shepard et al.* v. *Barkley et al.*, 247 U. S. 1, in determining the rights of control of church property within the Presbyterian Church, which has an almost identical church government as that existing within the United Lutheran Church in America, the Court said:

> "In resolving the many questions presented, some of which meet us at the threshold of the case, it will aid materially if we first determine the essential character of Presbyterian—and by this I mean also Cumberland Presbyterian—property; how it is held, by and for whom, and in what such Presbyterian property rights consist. In this church the religious congregation or ecclesiastical body holding the property is but a subordinate member of the general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control, more or less complete, in some supreme judicatory over the whole membership of that general organization. The local congregation is itself but a member of a much larger and more important religious organization, is under its government and control, and is bound by its orders and judgments. Therefore, when the property held by the church is that purchased or conveyed for the general use of the religious congreggation, not devoted forever by the in-

strument which conveyed it nor by any specific declaration of its owner to the support of any special religious dogmas, or any peculiar form of worship, it is and remains the property of the general church which exercises such general and ultimate power of control. It does not belong to the particular congregation which uses it, much less to the individual members of such a congregation. It does not belong to the presbytery or the synod, nor, in a strict sense, to the general assembly. It belongs to the church which is composed of its entire membership; that membership being governed and controlled by the organic law of the church, the administration of which is lodged in certain judicatories rising, in regular succession, to the general assembly or court of last resort, embracing in itself legislative, administrative, and judicial powers. The government of the Presbyterian Church is republican and representative in character. Its administration is vested, not in the individual members, not in the congregations, but in the general assembly and the presbyteries; and the church as a whole, acting through its supreme governing bodies, exercises the ultimate rights of ownership and control over all its properties."

The Circuit Court of Appeals in its opinion wholly failed to consider the holding in the cited case.

In *Trustees of the Presbytery of New York* v. *Westminster Church of West Twenty-third Street et al.*, decided by the Appellate Division of the Supreme Court of New York in 1911, 127 N. Y. Supp. 851, which case was cited in the *Barkley et al.* v. *Hayes et al.*, opinion, *supra*, the local congregation attempted to sell its property without the consent of the Presbytery, which consent was nec-

essary under the organic law of the Presbyterian Church. The Presbytery brought the action to enjoin the local church from so conveying its property, and the Court used this language in its syllabus:

> "Where an incorporated church of the Presbyterian denomination and its trustees have no right to sell the church property or to apply to the court for leave to sell without consent of the Presbytery, having ecclesiastical jurisdiction over the church, the Presbytery may enjoin the church and its trustees from prosecuting a proceeding for a sale of the church property and from instituting other like proceedings, independent of the question as to whether the Presbytery is entitled to have the premises conveyed to it."

The Circuit Court of Appeals wholly failed to give any consideration to the decision of the Circuit Court of Appeals, Fourth Circuit, in *Purcell et al.* v. *Summers et al.*, decided March 1942, 126 Fed. (2d) 390, which sustained the United States District Court for the Eastern District of South Carolina, Columbia Division, in its opinion rendered on July 25, 1940, 34 Fed. Supp. 421, as to the right of the plaintiffs to maintain the action, but reversed the trial court upon other grounds. This was a suit brought by eight Bishops of the Methodist Church, an unincorporated society, on behalf of themselves and all members of said Church against the defendants, who were officers and members of an unincorporated society holding itself out to be the South Carolina Conference of the Methodist Episcopal Church, South, to obtain a declaratory judgment determining the validity of a union of the Methodist Episcopal Church, the Methodist Episcopal Church, South,

and the Methodist Protestant Church, into a unified organization known as the Methodist Church. The South Carolina Conference of the Methodist Episcopal Church, South, refused to recognize the union, and defended the action on the specific ground that there were no property rights involved, and the only issue was one of an ecclesiastical nature. The Court, passing upon this specific question, held as follows:

> "We think that the lower court correctly held that the complaint presented a controversy justiciable in the courts and that the amount necessary to federal jurisdiction was involved. The questions involved in the case are not mere points of theology or church organization, but questions upon which property rights of great magnitude are dependent. Each of the Christian bodies which united for the formation of the Methodist Church owned valuable rights in property and had rights of great monetary value in their names and in the organizations which they had built up. The allegation of the bill is that the net value of the property owned by the Methodist Church as a result of the union exceeds $656,000,000; that it has permanent funds of over $14,000,000 and annuity funds of over $7,000,000; that its current askings for foreign missions exceed $3,900,000 and for home missions $2,500,000; that during the past twelve months it has raised for ministerial support and other purposes a sum in excess of $80,000,000; and that it has a membership of approximately 7,800,000, with 139 educational institutions, 83 hospitals and many other properties. It is further alleged that the value of the properties owned by the Methodist Episcopal Church, South, prior to the union was $400,000,000, that the value of local church buildings belonging to that church in the state of South Carolina was in excess

of $7,000,000, that these properties were held by trustees, boards, corporations, commissions and other agencies for the benefit of the church and its members, and that as a result of the union of the churches these properties are held for the benefit of the united church and its members and the religious and charitable undertakings in which they are engaged. The contention of defendants is that the legal ownership of these properties is not in the church or its membership but in various boards, trustees, commissions and corporations, but this does not meet the question involved; for plaintiffs contend that, while legal title to the properties is held by the boards, trustees, commissions and corporations, the right to the beneficial use of the properties is in the church organization for the religious and charitable purposes which it has undertaken, and that the right of control over them depends upon the validity of the union into which the three churches have entered, since the trustees, boards, commissions and directors of corporations are appointed by the church through its proper governing agencies. Even in the case of property held in trust for local congregations, the contention of plaintiffs is that the trustees hold it for that part of the congregation which adheres to the united church. See Zollman on American Church Law, par. 548. There can be no question, therefore, but that in asking an adjudication of the validity of the union and a declaration that the united church has succeeded thereby to the rights and properties of the Methodist Episcopal Church, South, the case presents a justiciable controversy affecting property rights of great value. *Helm* v. *Zarecor*, 222 U. S. 32, 32 S. Ct. 10, 56 L. Ed. 77; *Smith* v. *Swormstedt*, 16 How. 228, 14 L. Ed. 942."

Certiorari was denied by this Court on October 12, 1942, 317 U. S. 640.

In *Helm* v. *Zarecor,* decided by this Court in 1911, 222 U. S. 32, the action was brought by certain ministers, ruling elders and laymen of the Presbyterian Church in the United States of America, citizens of states other than Tennessee suing for themselves and for all other members of said church against certain individual defendants as representing "The Board of Publication of the Cumberland Presbyterian Church," a Tennessee corporation. The defendants filed a plea to the jurisdiction on the ground that some of the members of The Board of Publication of the Cumberland Presbyterian Church were in sympathy with the plaintiffs and that the corporation was not made plaintiff and if it were made plaintiff no diversity of citizenship would exist to give the federal court jurisdiction. This Court held that the trial court was under a duty to determine whether there was the requisite diversity of citizenship and to arrange the parties with respect to the actual controversy, but held that the Board of Publication of the Cumberland Presbyterian Church, a corporation, was itself a mere instrumentality or title-holder, and that the fundamental question involved was the right of the religious society claiming the beneficial use and control of the corporate agency. This case is cited for the purpose of showing that the mere fact that the property of the City Church is held in the name of a corporation does not defeat the right of the Kansas Synod to control the same under the organic laws of the Church.

The right of a superior judicatory within a church organization, such as the United Lutheran Church in America, to maintain an action to prevent the diversion of church property, was directly passed on by the Supreme Court of South Dakota in 1941 in *Presbytery of Huron et al.* v. *Gordon et al.*, 300 N. W. 33.

In that case the Murdock Memorial Church of Bancroft, South Dakota, was a religious corporation organized under the statutes of South Dakota, and was located within the boundaries and under the jurisdiction of the Presbytery of Huron, a Presbytery of the Presbyterian Church of the United States of America, and had been for many years. The title to the church property of the Murdock Memorial Church was held in the name of the corporation. In 1936 difficulties arose in the congregation and at a congregational meeting a resolution was enacted by the entire congregation present, except three members, to withdraw the Murdock Memorial Church from the Presbyterian Church of the United States of America and sever its relation with the Presbytery of Huron. This action was taken without the consent of the Presbytery, or any superior body of the Church, and when notice of the action was served upon the Presbytery it passed a resolution demanding possession of the Church, which was refused by the pastor and Session of the Murdock Memorial Church. This action was instituted by the Presbytery against the pastor and the officers of the Session of the Church to enjoin interference with the use of the church property by members remaining loyal to the Presbytery. The action was defended on the ground that the plaintiff,

the Presbytery of Huron, was not beneficially interested in the property held by the local religious corporation and was not entitled to maintain the action. The Supreme Court, in its opinion, held:

> Although the 'Murdock Memorial Church of Bancroft' is a separate corporation, it is not an independent entity. Neither is it 'the Church'. It is but an organism of the temporal body of the church. 'In its relation to the church it is not a spiritual agency with powers to preach the Gospel and administer the sacraments but a humble secular handmaid whose functions are confined to the creation and enforcement of contracts and the acquisition, management and disposition of property.' 'Nature of American Religious Corporations' by Dr. Carl Zollman, 14 Mich. Law Review 37. This distinction between the 'Church' on the one hand, and the society or corporation on the other, as its temporal body, has been recognized by this court. *Reinke* v. *German Evangelical Lutheran Trinity Church*, 17 S. D. 262, 96 N. W. 90; *State ex rel. Chamberlain* v. *Hutterische Bruder Gemeinde et al.*, 46 S. D. 189, 191 N. W. 635. Whether the corporation swallows up the society or exists separate and apart from the society, its significant status as the temporal body, or an organism of the ecclesiastical body, remains."

* * * * * * * *

> "It also follows that the Presbytery of Huron, as a subordinate body of the Church, charged with admitted responsibilities upon its behalf in the particular territory in which Bancroft is located, has an interest in the property of the Church and may complain of its diversion from the use to which that property has been dedicated. *Gibson et al.* v. *Trustees of*

Pencader Presbyterian Church in Pencader Hundred et al., Del. Ch., 10 A. (2d) 332."

To the same effect in *Gibson et al.* v. *Trustees of Pencader Presbyterian Church in Pencader Hundred et al.*, 10 Atl. (2d) 332, where it was stated in the syllabus:

"Where religious corporations holding property of local congregations affiliated with Presbyterian Church in the United States seceded from national organization and proposed to use property in connection with new and different religious organizations, members of national organization could file bill to enjoin such use, regardless of rights of members of local congregations, whose properties were involved."

All courts since the decision of this Court in *Watson* v. *Jones, supra,* have recognized that in a church organization of this kind that whenever the question of discipline, or faith, or of ecclesiastical rule, constitution, or law, has been decided by the highest of the church judicatories to which the matter has been carried, the legal tribunals must accept such decision as final and binding upon them.

The Circuit Court of Appeals ignored the resolution and pronouncements of the Kansas Synod (R. 12-18) wherein it specifically held in numerical paragraph 10 (R. 17) that the City Church is an integral part of the Kansas Synod and that the Kansas Synod as the general superior ecclesiastical body has a direct, inherent, and organic interest in such Church, and that the City Church must forever remain a part of it, except where its connection may be severed by mutual consent.

If the rule laid down in *Watson* v. *Jones, supra,* is to be followed, the Circuit Court could not disregard the judgment of the Kansas Synod wherein it held that the City Church was an integral part of the Kansas Synod and that the Kansas Synod had an direct, inherent and organic interest in the City Church.

We submit therefore that the Circuit Court of Appeals erred in holding that the Kansas Synod had no beneficial interest in the property of the City Church sufficient to maintain this action. Its opinion was in direct conflict with the principles laid down in *Watson* v. *Jones, Barkley et al* v. *Hayes et al., Purcell et al* v. *Summers et al., supra,* and other cases cited herein.

The City Church is under obligation to make payments to the Kansas Synod under its constitution.

The Circuit Court of Appeals in holding that the City Church is not under any legal or actionable obligation to make payments to the Kansas Synod completely ignored Section 2, Article VIII, of the Constitution of the Kansas Synod, *supra,* which reads:

> "Every congregation belonging to the Synod, as it has a share in all its acts and supervisions, shall comply with the Constitution, By-Laws, decisions and recommendations of the Synod and local Conference, and conform to its public worship and ministrations to the order used by the United Lutheran Church in America and approved by the Synod. It shall observe and make systematic effort to meet at least the apportionment for all objects to the Treasurer of Synod, and afford to all its members a regular channel of contributions for the benevolent operations of the church,

the minimum amount being indicated by a budget of apportionment by Synod to the congregation. It shall make earnest effort to pay such amounts into the Synodical Treasury in monthly installments. It shall make due and liberal provisions for the ministration of the Word and the Sacraments, endeavor to hold at least one service every Lord's Day and see that the pastor is properly supported; and make all necessary provision for the promotion of piety in its families and for the Christian training of the young."

While no penalty is provided by this provision of the constitution for failure to make payments to the Synod, certainly the command that it meet at least the amount of its apportionment, as provided by the Synod, leaves no alternative for the congregation but to make such payments.

No case in the civil courts has been found whereby an action has been instituted by a superior body within an organization of this kind to collect payments due, but reason dictates in the absence of court decisions that an organization such as the United Lutheran Church in America, having more than a million and a half members, could not long exist if the individual congregations were allowed to disregard the obligation they assume under the above quoted provision of the constitution; and we submit that the City Church by this provision is under the legal duty to afford its members a regular channel for contributions to the Church, and once the contributions are collected the City Church is under a legal obligation to pay the apportionment so collected into the treasury of the Synod.

The Kansas Synod has a right to maintain this action.

The Circuit Court of Appeals held that the Kansas Synod had no beneficial interest in the property held in the name of the City Church and that the City Church was under no legal or actionable obligation to make payments to the Kansas Synod for benevolences, and therefore the Kansas Synod had no rights violated by the change in the synodical affiliation of the City Church which would entitle it to maintain the action.

As has already been shown, the church judicatory has held that it has a direct, inherent and organic interest in such church, which judgment is binding upon the civil court. As has been shown, this Court in *Watson* v. *Jones, Shepard et al.* v. *Barkley et al.,* and the Circuit Court of Appeals for the Fourth Circuit in *Purcell et al.* v. *Summers et al., supra,* have recognized that the superior church judicatory in a church organization of this kind, has a beneficial interest in the property of the local church, even though it is held in the name of a corporation, sufficient to maintain an action to prevent its diversion.

It is submitted that the City Church being under the jurisdiction and control of the Kansas Synod—the superior judicatory within the United Lutheran Church in America —it is bound by the constitutional provision herein cited, and by the custom and usage of the church, to make payments and support the Kansas Synod in its benevolent functions; and it is submitted that the City Church is under a legal obligation, as provided by the constitution of the Kansas Synod, to make payments for the support of

the Kansas Synod. It being admitted that the value of the City Church property is $65,000.00, and further admitted that payments made by the City Church to the Kansas Synod in a five-year period amounts to more than $7,000.00, and it being admitted that diversity of citizenship exists, the Federal Court has jurisdiction and the Kansas Synod has the right to maintain this action.

CONCLUSION

The opinion and judgment of the Circuit Court of Appeals in dismissing this action is an adjudication that the City Church is independent in character and is under no obligation to the superior judicatories within the United Lutheran Church in America. And although the organization of the United Lutheran Church in America has existed for more than twenty years under a written constitution, and the Kansas Synod has existed more than fifty years under a written constitution, and the City Church has existed more than forty years under a written constitution and under the jurisdiction of the Kansas Synod, all of which constitutions bind these organizations into one compact and unified church, and provide for reciprocal obligations between the bodies, the opinion and judgment of the Circuit Court of Appeals, in effect, adjudges that the organic law of the Church as set forth in the respective constitutions has no binding force or effect in an action in a civil court to prevent the diversion of the church property, and that the City Church may disregard all of its ecclesiastical connections and obligations

by a vote of a plurality of the members of its congregation and divert its property from the use to which it is dedicated under the organic law of the Church.

It is submitted, if the City Church may disregard its obligation under the organic law of the Church and divert its property, that all other churches within the jurisdiction of the Kansas Synod may do likewise. It is submitted that if the churches within the jurisdiction of the Kansas Synod may divert their property, that the Kansas Synod may in turn divert its property from the United Lutheran Church in America, and that all other Synods composing the United Lutheran Church in America may do likewise. In effect, the opinion of the Circuit Court of Appeals, if allowed to stand, may well be a stepping-stone to the complete disorganization of 3980 congregations which are combined to make up the United Lutheran Church in America.

It is respectfully submitted that the petition for a writ of *certiorari* should be granted.

W. R. Bleakmore,
James E. Grigsby,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

August, 1943.

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(6)

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 249

THE EVANGELICAL LUTHERAN SYNOD OF KANSAS AND ADJACENT STATES, a Corporation,
Petitioner,

VERSUS

FIRST ENGLISH LUTHERAN CHURCH of Oklahoma City, a Corporation; FRED H. BLOCH, as Pastor Pretendant of such Church; and E. C. DOERR, J. H. WINNEBERGER, ALBERT SWANSON, STANLEY HOMER, WALTER QUICK, A. E. ROSENTHAL, V. H. SMITH and S. C. HOSHOUR, as Members of the Board of Deacons and Trustees,
Respondents.

BRIEF OF RESPONDENTS' OPPOSING ISSUANCE OF WRIT OF CERTIORARI

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August, 1943.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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Comes now your Respondents, the First English Lutheran Church of Oklahoma City, a corporation, *et al* respondents herein and present this as their brief and argument in opposition to petitioners prayer for a Writ of Certiorari.

STATEMENT OF THE RECORD

Except in these particulars the Respondents approve the "STATEMENT" of the record set out at Pages (2)-(5) of the petitioners brief. It is *not true* that the record shows that the Respondents if permitted to withdraw from the Kansas Synod "a sum in excess of Seven Thousand Dollars ($7,000) will be diverted from the Kansas Synod in said period." It was so alleged in petitioner's complaint in the lower court in Paragraph 17 at Page 21 of the record. This conclusion of the amount which would probably be collected in the future from voluntary contributions is denied by the Respondents in their answer at Page 42 of the record. There is no evidence in the record or stipulation of facts supporting petitioner's stated bold conclusion.

We add this to the statement of the record. "Midwest Synod is likewise an orthodox Synod in the United Lutheran Church. The two Synods overlap in some territory" including the State of Oklahoma. See Appellate Court's opinion page (107) record.

When the Respondents withdrew from the Kansas Synod they, at the same time, "affiliated with the Midwest Synod," see Page 107-108 record. The Oklahoma City Church did not step out of the general Lutheran organization, of which the United Lutheran Church of America is the head. The local Lutheran Church never denied the Lutheran faith.

SUMMARY OF RESPONDENTS' ARGUMENT

Following the order of argument submitted by petitioner in its brief we will submit that the Respondent Church is autonomous except as to rights granted by it to the Kansas Synod, that the Respondent Church is the absolute owner of the local church property, is under no obligation to make enforceable payments to the Kansas Synod, that the Kansas Synod owns no property rights involved in this case and that therefore the Kansas Synod has no right to maintin this suit in the Federal Court and that the opinion of the Circuit Court of Appeals is correct.

RESPONDENTS' ARGUMENT

At page 18 of petitioner's brief, the petitioner erroneously makes a statement which is a very *deceitful half truth.* This deceitful half truth is couched in this language:

> "The City Church is not an independent organization, but is a member of a much larger and more important religious organization, and is under its government and control."

Generally and broadly speaking there are two forms of church organization. In one form, all power is vested originally in the general or supreme body. By it local churches are created and given only such power as the general or supreme body grants unto it. In the other form, the individual local churches are the first to exist, each local church being independent and all powerful in

its own affairs. These local independent churches meet together and organize a general body but that general body acquires only such rights and powers as the local churches creating it see fit to give such general body. We refer to the former as being organized from the top down, and the latter as being organized from the bottom up. In the former the hen is first on earth and lays the egg—in the latter the egg is first on earth and hatches out the chicken. The Lutheran Church comes within the second classification, organized from the bottom up.

The dispute in this case first resulted in an appeal from the decision from the Kansas Synod unto the United Lutheran Church in America, commonly referred to by its initials—U. L. C. A. Now that body is one created by the joint action of the various synods in America; it is the supreme Lutheran body of the Church.

Let us look to the church law as announced by the supreme body of the Lutheran Church.

The decision of this supreme Lutheran body is set out in the supplemental complaint of the petitioner as filed in the lower court. Please bear in mind that we are undertaking to determine the extent of the rights and powers of the Kansas Synod. At Page 39 of the record the U. L. C. A., in its decision announced by its Commission of Adjudication says, "*according to the policy of the United Lutheran Church in America, congregations are the primary bodies through which power committed by Christ to the Church is normally exercised. Congregations may, however, for certain ends, unite to form Synods. A Synod is a*

voluntary organization of autonomous congregations, governed by its fundamental laws."

Please note that this supreme Lutheran Church body, the U. L. C. A., has in this very case decided and announced that, in the beginning each local church congregation was *autonomous*—i. e., self-governing. These autonomous local congregations created the Kansas Synod. Now, what rights and powers did the Kansas Synod acquire? This supreme Lutheran body, the U. L. C. A., decided that question also in its decision thus announced and set out at page 38 of the record; it said, "* * * *the Synod has no more power than the congregations uniting in the Synod confer, when they accept the synodical constitution."* In this decision the U. L. C. A. quotes with approval from the well-recognized Lutheran Church Historian, the late Edmund Jacob Wolf, D.D. In his great work entitled "The Lutherans of America" at page 125, this noted authority says, *"The Lutheran Church recognizes in no form of church government any divine right beyond that of the Sovereignty of the individual congregation."*

And so we find it was held by the supreme body of the Lutheran Church that the local congregation, Respondent in this case and referred to by the petitioner here as the "City Church," was in the beginning, fully autonomous—i. e., completely self-governing. The Kansas Synod has no rights except and unless such rights and powers were given unto it by the local congregation, the City Church.

It is elementary that when questions of church law

regulating their internal government "* * * *have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."*

At page 28 of petitioners brief herein, we take this quotation from the decision of this Court in *Watson* v. *Jones*, 13 Wall. 679-20 L. ed. 66. This rule thus cited by the petitioner here is too elementary to justify other citation:

> "While the Court will not recognize the parties agreement as to the laws of the land yet an agreement as to church law of which the Court does not take judicial knowledge is an agreement of *fact* and will be accepted by the Court."

In this case by written stipulation the parties hereto agreed that the decisions of the U. L. C. A. announced through its Commission of Adjudication are "the law of the church and are binding upon the parties to this suit." See p. 49 record.

In the beginning of this discussion we quoted petitioner's statement taken from page 18 of its brief, saying it was a statement of a deceitful half truth. The whole truth, correctly stated is that:

> *"The City Church is an autonomous organization, except wherein it may have conveyed a way and conferred upon the Synod some of its original inherent rights and powers."*

Therefore, to determine what rights and powers the Kan-

sas Synod has, if any, in and over and concerning the property of the City Church we must look and see whether the City Church has given any such rights and powers to the Kansas Synod.

The place to look in order to determine whether the local church has given any such rights and powers to the Kansas Synod is the constitution of the local church and the constitution of the Kansas Synod which the local church accepted when it and the other local churches created the Kansas Synod.

Stipulations of facts were submitted in the lower court. Therein the parties agreed to be correct certain specified excerpts and quotations from the constitutions and by-laws of the Kansas Synod and the City Church. Said supplemental complaint appears at pages 23 and 24 of the record, exhibit A thereto, immaterial here now, at pages 24 to 35 of the record and exhibit B thereto, at pages 35 to 40 inclusive of the record. Now the only constitutional provisions appearing in that supplemental complaint or its exhibits appear at pages 37 and 38 of the record. Therefore, those constitutional provisions appearing at pages 37 and 38 of the record being six in number *are the only constitutional provisions before this Court.* We therefore respectfully decline to give consideration to any other constitutional provisions.

It is true that in the aforesaid stipulation of facts it is recited that the Court may give consideration to certain "excerpts and quotations" from the "plaintiff's brief" sub-

mitted to the lower trial court. Now that said "plaintiff's brief" filed in the lower court is not set out in the record before this Court and *this Court on appeal therefore cannot know and the writer of this brief does not remember what those other excerpts were.* Hence the writer of this brief is not permitted to discuss those stray excerpts not appearing in the record before this Court and *this Court not knowing what they were cannot now consider them.* We submit therefore that this Court cannot give consideration to the extensive alleged constitutional provisions appearing at pages 18 to 24 inclusive of the petitioners brief in this case. The Court is limited to a consideration of the constitutional provision appearing in petitioner's supplemental complaint appearing at pages 37 and 38 of the record.

Please bear in mind we are hunting for constitutional provisions of the Kansas Synod or local church by which the local church gave the Kansas Synod any ownership or right of control of any of the property of the local church.

We have read and reread those six provisions of the constitutions of the Kansas Synod and the City Church: *There is no such provision there. It is very interesting to note that the local church is not required to continually maintain its connection with the Kansas Synod.* The only requirement is that the local city church "shall always be connected with a district Synod * * *." Just any district Synod. The Midwest Synod to which the City Church transferred fills that requirement.

We therefore respectfully submit that in so far as is concerned the ownership and control of the property of the City Church, the City Church is entirely fully and completely autonomous to the complete disregard of the Kansas Synod.

The Respondents respectfully submit that the petitioner is in error at page 26 of its brief where it asserts and thereafter discusses its statement that *"the Kansas Synod as a Superior Church Judicatory has a beneficial interest in the property of the City Church."*

At page 49 of the record is stipulated that, *"The church buildings and the real estate on which same is situated are owned by, and held in the name of, "First English Lutheran Church of Oklahoma City."*

It is important to observe that this city property is not only held in the name of the City Church, but it is further stipulated that said property is actually *"owned by"* the City Church. Apparently, the parties to this suit, when they wrote this stipulation of facts had clearly in mind the distinction between (a) *actually owning the property* and, (b) merely having the property in one's name of record.

Webster's first and preferred definition of the word "Own" is "belonging to one's self." It is very apparent that when the parties wrote this stipulation wherein they recited that this property was held of record "in the name of" the City Church they sought to definitely exclude the idea that the Kansas Synod owned any interest therein. In

order to do so they further stipulated that this property was actually "*owned by the City Church.*" We think that thereby they did definitely negative any claim of any kind of ownership of any sort of an interest by the Kansas Synod.

If perchance by any overdrawn imaginative theory it could be claimed that the Kansas Synod owned any sort of an interest in this property it must be said that such ownership was for the benefit of The United Lutheran Church of America, superior to the Synod, and for the benefit of the entire Lutheran Church body of America. It held such claim merely by virtue of being the Synod to which Respondents then belonged and when Respondents withdrew from the Kansas Synod and joined the Midwest Synod such claim was thereby transferred to the Midwest Synod for the benefit as before of the U. L. C. A. and the entire Lutheran Church body of America.

The claim of the Kansas Synod was transferred to the Kansas Synod's successor, the Midwest Synod. Neither the act of the Respondents in transferring nor the judgment of the Court took away any interest of the general Lutheran Church body of America. *If any Superior Church body owns a beneficial interest in this property it is the U. L. C. A. and not the Kansas Synod.*

Very clearly it appears that when the parties entered into this stipulation stating who actually owned this property, the petitioner had no idea of claiming any interest in this property. It did not assert such ownership in its complaint.

It did not conceive this notion until it had lost in the Circuit Court of Appeals. Like the proverbial ostrich hiding its head in the sand the petitioner here hides from this clearly stipulated fact. It does not even mention the stipulation in its brief.

One pages 27 to 38 inclusive of its brief the petitioner attempts to bolster up its argument by quotations from various judicial decisions. None of these decisions are influential here for two reasons: *First,* in none of those cases did there appear a stipulation of facts like the one here as to who actually owned this property, and, *Second,* because in none of those decisions does it appear that the church involved was organized and existed (like the Lutheran Church) with the local congregations being autonomous and having all the rights and powers not conveyed by them to a general body. In none of those cases does it appear from the opinions of the Court that the general church body had no inherent rights and powers but had only those rights and powers given to it by the local churches.

In most of those cases the church involved had been organized from the top down, had broad inherent powers which it had not relinquished to the local congregation (different from the Lutheran Church).

It does not appear from the opinions there that rules applicable to such churches would be applicable here.

We will observe only the decisions cited from the Circuit Court of Appeals and this Court to show that there

is no conflict between those decisions and the decision of the Circuit Court of Appeals here. *No ground exists for certiorari here.*

At page 27 of its brief petitioner refers to *Watson* v. *Jones,* 13 Wall. 679, 20 L. ed. 666. This is a *Presbyterian Church* case. This is one of those churches organized from the top down where all power originally inheres in the upper body, the *Presbytery.* The local congregation has only such rights and powers as trickles down to it from the Presbytery. In this Presbyterian Church the Court says that the local congregation "*is under (Presbytery's) government and control and bound by its orders and judgments.*" This is not the situation in the case at bar. The local Lutheran congregation is fully autonomous except in so far as any rights and powers given by it to the Synod. No constitutional provision or other Lutheran law appear in the record in this case showing that the local Lutheran Church here ever gave to the Kansas Synod any rights and powers other than ecclesiastical supervision of its adherents to the Lutheran faith. The U. L. C. A., the supreme Lutheran body decided this question in its decision in the appeal; it said at page 38 record "* * * *all Synodical power is simply that of administering the means of grace, and testifying to the truth.* * * *. The Synod has no more power than the congregations uniting in the Synod confer* * * *." Now the United States Supreme Court in this very case said that the decisions of the church on church law must be accepted by the legal tribunals "as binding on them in their application to the case before

them." So out goes this Presbyterian case as a precedent in the case at bar.

Furthermore the parties in the case at bar have covered this question by their own stipulation, by their agreement of record that the local church property is not *merely* held in the name of the local church of record but that it is actually *owned by* the local church.

At page 29 of its brief the petitioner refers to the case of *Barkley et al.* v. *Hayes et al.*, and *Synod of Kansas of the Presbyterian Church, etc.* v. *Mo. Valley College et al.*, 208 Fed. 319, affirmed in 247 U. S. 1.

This is another Presbyterian case. By reference we refer to what we have said above about the frame-work of the Presbyterian Church. The petitioner quotes, at page 25 of its brief, to the effect that the local congregation in the Presbyterian Church holds subject to a "general and ultimate power of control, * * * is under its government and control, and is bound by its orders and judgment." *So entirely different is the Lutheran Church law from this Presbyterian law that this case is no authority here.*

At page 30 of its brief petitioner refers to the *Trustees of the Presbytery, etc.* v. *Westminster Church, etc.*, 172 N. Y. Supp. 851. Council for petitioner *effectively eliminates* this case from consideration by saying at the bottom of page 30 of its brief that "consent was necessary under the organic law of the Presbyterian Church" in order for a local church to sell church property.

At page 31 of its brief petitioner refers to *Purcell et al*

v. *Summers et al.*, 126 Fed. (2d) Supp. 421. *Just why this case is cited and quoted from at length is far beyond our understanding.* Three large, wholly independent, and separately organized national Methodist organizations were in existence.

They consolidated. The new consolidated organization brought a suit against the South Carolina conference which was a part of or subsidiary of one of the three original organizations which was consolidated into the new organization. The latter was claiming church property in its jurisdiction and denying the validity of the consolidation. The new consolidated organization brought suit in the federal court claiming this same church property and asking for a declaratory judgment. It alleged facts which if proven would justify its contention. These facts the South Carolina Conference denied. Now all that the federal court decided was this, "We think that the lower court correctly held that the complaint presented a controversy justiciable in the courts and that the amount necessary to federal jurisdiction was involved."

Of course! That is exactly the question that the Circuit Court of Appeals decided in the case at bar. It decided that upon the record in this case the Kansas Synod owned no interest in the local church property and therefore could not maintain this suit in the federal court.

At page 35 of its brief petitioner refers to the case of *Presbytery of Huron et al.* v. *Gordon et al.*, 300 N. W. 33. This is another Presbyterian case and what we have

heretofore said about Presbyterian Church organizations will suffice here and will also suffice for the next Presbyterian case cited at page 37 of petitioner's brief.

At the bottom of page 37 of its brief petitioner refers to the holding of the Kansas Synod which holding was reversed by the holding of the U. L. C. A., the supreme Lutheran body on appeal as heretofore discussed.

It would be funny if it were not so serious that the petitioner refrains from quoting from the decisions of any Lutheran Church cases. It confines its quotations almost solely to the Presbyterian Church cases. The Presbyterian organizations are so differently constituted that interpretation and application of Presbyterian Church law can have no influence here. At the bottom of page 24 of its brief, presumably to give a little color to its brief petitioner does cite a few Lutheran cases. No quotations are set out. We submit that a reading of those decisions will show no conflict with our contentions here.

At page 38 of its brief the petitioner says and thereafter discusses the statement to-wit:

The City Church is under obligation to make payments to the Kansas Synod under its Constitution.

The record does not support this statement. The only constitutional provisions appearing in the record are the six excerpts appearing at pages 37 and 38 of the record. These are absolutely all of the laws of the Kansas Synod or of the City Church which are before this Court. In none of those excerpts is reference made to payments to

be made by the City Church to the Kansas Synod. Therefore this bold statement by petitioner falls without support.

We apologize for referring to the alleged constitutional provisions appearing at pages 18 to 24 of petitioners brief. They are not in the record. The record before this Court shows that pages 4 to 104 inclusive contains all the record which was before the Circuit Court of Appeals.

We must not be misled by the fact that the trial judge wrote an opinion in the lower court and at pages 80 to middle of page 84 inclusive the trial judge sets out some alleged excerpts of constitutional provisions.. *We do not know where he found them. They are not in the record.* That is the decision from which petitioners appealed and is the decision which the Circuit Court of Appeals set aside. There is no proof in the record that the said constitutions contained such provision. Therefore those excerpts cannot be considered by this Court. *However, none of those constitutional provisions even refer to payments to be made to the Kansas Synod by the City Church.*

We are confident that it is impossible for this Court to consider the alleged constitutional excerpts set out by petitioner at pages 18 to 24 inclusive of its brief because said constitutional provisions do not appear in the record before this Court and did not even appear in the record before the Circuit Court of Appeals. Even if same were to be considered by this Court we find the only financial obligations referred to at page 22 of petitioner's brief.

Even that provision is insufficient to support petitioner's claim. That provision, in substance says that every congregation shall *"make systematic effort to meet"* the demands of the treasurer and "to pay such amounts." There is no requirement that the City Church raise any money or pay any money to the Kansas Synod and there is no amount of money even suggested. It is required merely that the congregation shall *"make systematic effort"* and shall *"make earnest effort to pay."*

Hence even if this Court considers that constitutional provision set out in petitioner's brief but not in the record all that can be said thereof is this—that the Kansas Synod thereby obtained the hope of receiving future voluntary contributions at times indefinite and in amounts uncertain with no method of enforcing the realization of such fond hopes. *This was probably a sweet hope for the Kansas Synod to cherish but like precious faith, hope and charity has no present monetary value sufficient to give the Federal Court jurisdiction.*

We have heretofore called attention to the fact that petitioners conclusion that these contributions would amount to Seven Thousand Dollars ($7,000) in five years is unsupported by proof or stipulation and is denied in our answer at page 42 of the record. It is apparent that if the Kansas Synod could force this congregation, against its will to remain in the Kansas Synod, that the voluntary contributions which it would thereafter make to the Kansas Synod might *not amount to even Seven Thousand Cents in five years.*

We therefore submit that the *Circuit Court of Appeals* is correct in its opinion where it says of these voluntary contributions that the City Church "*may discontinue making them at its election; and the Synod of Kansas cannot exact them under penalty of law.*"

At page 40 of its brief the petitioner says and very briefly discusses this statement to-wit: The Kansas Synod has a right to maintain this *action.*

What we have heretofore said in this brief is sufficient answer to this allegation.

At pages 41 and 42 of its brief the petitioner makes some remarks under the heading of "Conclusion". It says on page 42 that if the City Church be thus permitted to withdraw from the Kansas Synod and join the Midwest Synod it will play havoc with the United Lutheran Church in America. It seems to overlook the fact as shown by the depositions of Rev. Goedde and of Rev. Schroder at pages 53 and 60 of the record, and wholly undenied in this case that a short time ago the Kansas Synod took five separate local churches away from the Midwest Synod, wholly without the consent of the Midwest Synod. The Lutheran Church body of America withstood these transfers without injury. None of these fanciful notions and theories of the Kansas Synod urged here occurred to or seemed sound to the Kansas Synod then. It is apparently the theory of the Kansas Synod that the Lutheran Church law changes to suit its whims.

There is no question here which justifies a writ of *certiorari.*

Respectfully submitted,

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August, 1943.

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(7)

In the Supreme Court of the the United States

(OCTOBER TERM 1943)

No. 249

THE EVANGELICAL LUTHERN SYNOD OF KANSAS AND ADJACENT STATES, a corporation,
Petitioner,

VERSUS

FIRST ENGLISH LUTHERN CHURCH OF OKLAHOMA CITY, a corporation; FRED H. BLOCH, as Pastor Pretendent of Such Church; and E. C. DOERR, J. H. WINNEBERGER, ALBERT SWANSON, STANLEY HAMER, WALTER QUICK, A. E. ROSENTHAL, V. H. SMITH and S. C. HOSHOUR, as Members of the Board of Deacons and Trustees,
Respondents.

REPLY BRIEF OF PETITIONER

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September, 1943.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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REPLY BRIEF OF PETITIONER

The respondents in their brief opposing the issuance of the writ of certiorari admit that the Kansas Synod has some power over the City Church. They say to determine the extent of that power we must look to the constitution of the Kansas Synod and the City Church. They admit that those provisions found on pages 37 and 38 of the Record are parts of the constitution of the Kansas Synod, so it is conceded that these provisions are binding upon the

City Church. The first provision, in the order in which they are found in the Record, is Article One, Section 3, paragraph 4 (R. 37), which provides:

> "Every congregation shall be faithful to its obligations to this (Kansas) Synod in all matters of support, practice and church government."

No construction of this provision is necessary, it simply means what it says. Article Six, Section 2, paragraph 3 (R. 37) provides:

> "Contemplated changes of its (the local church's) constitution, affecting its articles of faith, *adherence to the Synod and the United Lutheran Church in America, and disposition of its property,* shall be reported to the President (of Synod) for his approval." (Italics ours).

Nothing can be plainer than this language. By it the Synod is given power to supervise and control the City Church, not only in its method of worship, but it cannot sever its membership with the Synod nor dispose of its property without the approval and consent of the President of the Synod.

Article Eight, Section 2, paragraph 1 (R. 37) provides:

> "Every congregation belonging to the Synod, as it has a share in all its acts and supervisions, *shall comply with the Constitution, By-laws, decisions and recommendations of the Synod,* and Local Conference and conform to its public worship and ministrations to the order used by the United Lutheran Church in America and approved by the Synod." (Italics ours)

This provision unequivocally gives the Synod full and complete control over the congregation.

Article Eight, Section 2 (R. 37) provides:

"In cases of vacancy, difficulty or strife in a congregation, the church council *shall seek the advice and instruction of the President of Synod.*" (Italics ours).

and in Article Eight, Section 4 (R. 37-38) it is provided:

"In case of strife and division, should any part of a congregation or pastorate belonging to the Synod reject the faith as set forth in Article One, Section II, *or revolt against the constitutional provisions, or its obligations as a member of the Synod,* that part of the congregation or pastorate, whether majority or minority of its membership, which continues in unity with the Synod and its faith shall be recognized as the lawful congregation or pastorate." (Italics ours).

Plainly it was the purpose of the framers of the constitution of the Kansas Synod, as shown by the last two provisions above quoted, to keep harmony in the local congregation, but in the event this could not be done, then that part of the congregation, whether majority or minority of the membership shall be the lawful congregation. Why is this provisions? Obviously, so that there shall always be a local congregation in membership with the Synod.

We submit that under these provisions of the constitution of the Kansas Synod, it has complete jurisdiction and control over the City Church.

Respondents say that the stipulation contained in the Record, that the property is owned by the City Church, bars the Kansas Synod from claiming any interest therein. But as heretofore shown, that ownership is for the benefit of all of the members of the United Lutheran Church in

America, and the right to control it is regulated by the organic law of that church through the judicatories established for the government of the church.

The contention that the government within the Presbyterian Church in the United States of America is different from that existing within the United Lutheran Church in America is untenable. No attempt is made by respondents to point out the distinction, other than say that one is governed from the "top down" and the other is governed from the "bottom up." We sumbit that the forms of government existing in the Presbyterian Church in the United States of America and the United Lutheran Church in America, are both representative and republican. The judicatories in the Presbyterian Church in ascending order are: the Session, the Presbytery, the Synod and the General Assembly. The corresponding judicatories within the United Lutheran Church in America are: the Council, the Conference, the Synod and the General Synod.

Respondents contend that *Watson* v. *Jones,* 13 Wall 679, 20 L. ed. 666, being a Presbyterian case, is not authority here that the City Church is under the government and control of the Kansas Synod and bound by its orders and judgments. But they overlook Article Eight, Section 2, paragraph 1 of the Constitution of the Kansas Synod, *supra,* which was accepted by the City Church, wherein it is specifically provided that it "shall comply with the constitution, by-laws, decisions and recommendations of the Synod."

It is argued that *Purcell et al.* v. *Summers et al.,* 126

Fed. (2d) 421, is not authority here. That action was brought by eight Bishops of the unified Methodist Church for the benefit of the church, against the South Carolina Conference of the Methodist Episcopal Church, South, for a declaratory judgment finding that the unified church had succeeded to the property and rights of the Methodist Episcopal Church, South. The defense in that case, as here, was that no property rights were involved, as all of the property within the South Carolina Conference was owned by various boards, trustees, commissions and corporations, but the Court held that the *beneficial use of the properties was in the general church organization and subject to its right of control.*

Nagle et al. v. *Miller et al.*, decided by the Supreme Court of Pennsylvania in 1922, 188 Atl. 670, and cited in our original brief, involved an action by one faction of a congregation to recover possession of the Evangelical Lutheran Church of the Holy Communion of Harrisburg. Upon its organization, it became affiliated with the Evangelical Lutheran Ministerium of Pennsylvania and Adjacent States, a synod of the General Council of the Evangelical Lutheran Church in America. It purchased property, and built a church building, receiving financial aid from the conference and ministerium and Board of Missions of the General Council of the Evangelical Lutheran Church in North America. In 1905 it was incorporated. In 1918 the General Council of the Evangelical Lutheran Church in North America merged with the General Synod of the Evangelical Lutheran Church of the United States, (formerly the general synod of the Kansas Synod), and the Evangelical

Lutheran Church of the United Synod in the South, to form *the United Lutheran Church in America.* Part of the congregation of the Harrisburg church opposed the merger and at a congregational meeting a majority of its members voted to withdraw from the Ministerium and conference, and excluded the minority of the congregation which favored the merger, from the church. The minority thereupon brought suit to have the action of the majority in withdrawing the church declared illegal and an unlawful diversion of the church property. The action was defended on the ground that the Harrisburg church was not bound by the course adopted by the general Council in forming the union with other synods under the name of the United Lutheran Church in America. The Court passing on the question of the power of the synod over the congregation said, as stated in the syllabus:

> "A Lutheran Church, organized as a mission under the supervisions of the Lancaster Ministerium through its agent, a conference, and subsequently admitted into the Ministerium and conference and afterwards incorporated for the purpose of public worship according to the faith, doctrine, discipline and usages of the Evangelical Lutheran Church as interpreted and promulgated by the General Council of the Evangelical Lutheran Church in North America, held, an associated church in union with the Ministerium, Conference and General Council and subject to the order and discipline of the denomination and synod to which it belonged and not authorized to divert its property from the purposes of that organization."

This case is referred to as it gives an historical background of the formation of the United Lutheran Church in Amer-

ica, and because it unqualifiedly holds that the congregation is subordinate to the synod and subject to its orders and judgments.

In *First English Evangelical Lutheran Church of Los Angeles et al.* v. *Disinger et al.*, decided by the District Court of Appeal of California, in 1931, hearing denied by the Supreme Court of California in 1932, 6 Pac. (2d) 522, there was involved a dispute over possession of Lutheran Church property. The attempt there to divert the property was by amending the constitution of the local church in order to make it independent. The District Synod decided that such action could not be taken by the local congregation, and held that the loyal members of the congregation were entitled to the property. The Court said as stated in the syllabus:

> "Determination of district synod, of which plaintiff church was member, of conflicting claims to church property in favor of plaintiff church, held conclusive."

This case is referred to not only to show that the synod has power of supervision and control over the congregation, but also that its finding and decisions are binding upon the courts.

The respondents argue that no grounds for *certiorari* exist. As stated in our original brief the opinion of the Circuit Court of Appeals, holds that the City Church is independent and free from control of the Kansas Synod in the use of its property. That the Kansas Synod has no beneficial interest therein, and that the City Church is under no enforceable obligation to make payments to the

Kansas Synod. It held that the Kansas Synod could not maintain an action against respondents, and dismissed the action. If this judgment is allowed to stand, and unless this Court grants *certiorari*, it forever closes the door on the Kansas Synod enforcing its judgments and orders as a superior ecclesiastical judicatory against the City Church. If the loyal faction of the congregation of the City Church attempts to bring an action against respondents in the state court for possession of the church property, to which it is entitled under the order and decision of the Kansas Synod, it will be met at the outset by the complete defense that the Circuit Court of Appeals has adjudicated that the Kansas Synod has no control whatsoever over the City Church, and the entire organization of the Kansas Synod shall be completely destroyed.

Because of the opinion of the Circuit Court of Appeal, in which it assumed upon its own motion, that the City Church was independent, the Kansas Synod, although it has exercised all of its powers as a superior ecclesiastical judicatory, over the City Church, which powers are plainly given it by the organic law of the church, in its attempt to enforce its judgment in the civil court, which judgment should be binding and conclusive upon the civil court, not only is denied relief, but is adjudged by the civil court to have no power whatsoever over the City Church. That although its constitutional powers over the congregation are admitted by respondents, they are in possession of the church property under a minister who has been suspended by the Kansas Synod, in open defiance to the Synod, and it

is powerless, in spite of the power admittedly given it, to do anything about it.

We submit therefore *certiorari* should be granted by this Court for the following reasons:

1. The judgment of the Circuit Court of Appeals will result in a miscarriage of justice.

2. The judgment of the Circuit Court of Appeals is contrary to the settled law as handed down by this Court in *Watson* v. *Jones, supra,* and *Barkley et al.* v. *Hayes et al.,* 208 Fed. 319, affirmed in *Shepard et al.* v. *Barkley et al.,* 247 U. S. 1.

Respectfully submitted,

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